No. [redacted]119

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

ALVAH CROCKER ET AL., TRUSTEES, PETITIONERS,

v.

JOHN F. MALLEY, COLLECTOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OCTOBER TERM, 1922.

ALVAH CROCKER ET AL., TRUSTEES, PETITIONERS,
v.
JOHN F. MALLEY, COLLECTOR, RESPONDENT.
No. 587.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The case involves the validity of a special excise tax imposed under section 407 of the revenue act of 1916 (39 Stat. 789), and section 1000 of the revenue act of 1918 (40 Stat. 1126).

Section 407 provided:

> Every * * * association now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * shall pay annually a special excise tax with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each $1,000 of the fair value of its capital stock, and in estimating the value of capital

> stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year * * *.

The revenue act of 1918 provided in section 1 that the term "corporation" includes "associations and joint stock companies." Section 1000 provided:

> That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the revenue act of 1916—
>
> Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *.

The petitioners are trustees of the "Crocker, Burbank & Co. Ass'cn," an association evolved in 1917 from the "Wachusett Realty Trust," which was a strict trust. The present case is a suit to recover a tax of $5,212 imposed upon the association under the revenue act of 1916 for the period from July 1, 1918, to June 30, 1919. An additional tax for the same period was imposed upon the association under the revenue act of 1918, and the $5,212 paid under the 1916 act was credited against this amount.

The respondent regards section 407 of the act of 1916 as having precisely the same scope and meaning

as section 1000 of the act of 1918. If, however, taxes were properly imposed upon the association under the act of 1918 but not under the act of 1916, the petitioners are not entitled to recover. If the tax is legally due there can be no recovery even though the collection was illegal or based on an erroneous assumption. *Anderson* v. *Farmers Loan and Trust Company*, 241 Fed. 322, 329; *New York Life Insurance Company* v. *Anderson*, 263 Fed. 527, 530.

The petitioners concede for the purposes of the present petition that Crocker, Burbank & Co. Ass'cn is an association within the scope of the excise tax provisions of the revenue acts of 1916 and 1918. Their claim for exemption rests upon the contention that associations which have not issued stock of a fixed amount pursuant to some charter provisions do not have any "capital stock" within the meaning of the acts of 1916 and 1918 and that such associations are therefore not subject to the excise tax under these acts. They further contend that unless some portion of the property of the association is designated as "capital" in its account books the association has no "capital" or "capital stock" within the meaning of the excise tax provisions of the acts of 1916 and 1918.

The term "capital stock" is one of frequent and not uniform use, and it is often necessary to resort to the context to see how it is used in a particular case. *Powers* v. *Detroit and Grand Haven Railway*, 201 U. S. 543, 559. The revenue acts of 1916 and

1918 expressly provide that "in estimating the value of capital stock the surplus and undivided profits shall be included." The inclusion of these items in estimating the value of capital stock destroys any possible basis for holding that the words "capital stock" are used in the narrow sense of a fixed amount paid in. The acts furthermore provide that the tax is to be measured by the "fair average value" of the capital stock. Capital stock in the sense of an amount fixed by charter provisions as the authorized capitalization for the transaction of business is a fixed amount, and if the taxing statutes had intended to refer to such a fixed amount they would not have based the tax upon the "average value" of the capital stock.

The petitioners have not suggested any reason why Congress should have desired to favor associations and joint stock companies whose stock had no par value by exempting them from taxation to which their competitors having stock of par value are subjected. The presumption is plainly against such an exemption.

The petitioners' construction of the excise tax would offer an easy method of evasion by the formation of associations and joint stock companies with stock of no par value. In *Carbon Steel Company* v. *Lewellyn*, 251 U. S. 501, 504, this court refused to adopt the construction of a tax statute which "reduces the act to a practical nullity on account of the ease of its evasion."

The respondent submits that both the wording of the tax laws and the evident intent of Congress in enacting them show that the excise taxes imposed under the revenue acts of 1916 and 1918 are imposed upon associations having a capital stock, although there are no charter provisions fixing the par value of such capital stock.

The words "having a capital stock represented by shares" as used in section 407 of the act of 1916 do not appear in the 1918 act, and it is therefore immaterial whether or not the capital stock in the case at bar was represented by shares. The respondent submits, however, that the capital stock of the association in the present case is represented by shares. A share of stock is evidence of the right to participate in the earnings of an organization during its existence and in the division of its assets upon dissolution. In *Malley* v. *Bowditch*, 259 Fed. 809, it was held that certificates issued by an unincorporated association similar to the association involved in this case were properly described as certificates of stock. The character of the interests of the shareholders of the Crocker, Burbank & Co., Ass'n. is shown by the certificates of beneficial interest issued to them (R. pp. 30–31):

> This is to certify that ———, of ———, is entitled to ——— of the ninety-six thousand shares in the net proceeds of the property held under declaration of trust made by Alvah Crocker et al., dated March 29, 1912, then known as "The Wachusett Realty Trust,"

> as modified by instrument dated June 26, 1917, by which, *inter alia*, the name was changed to "Crocker, Burbank & Co. Ass'cn.," when said property is converted into cash, and meantime to income, all as therein provided. * * *
>
> The holder hereof has no interest, legal or equitable, in any specific property, and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose of the trustees or their agents.

The petitioners further allege (brief, p. 4) that the district judge found that the association in the present case had no "capital." They contend that if the association had no capital it could have no capital stock.

The findings of the district judge are as follows (R. p. 21):

> No account designated as "capital" account has been, or is, kept by the trustees. They charge themselves in a "profit and loss" account with all the property transferred to them, at a valuation, and show against it liabilities and reserves. The balance is carried as the net interest of the shareholders.

The respondent submits that the findings of the district judge show that the association had a capital account, although it was not expressly designated as such. This is confirmed by the association's balance sheet shown as of July 1, 1917. (R. p. 32.) The assets and liabilities of the association are there set up, and one of the liabilities is to "Association Share-

holders $9,877,105.16," being the difference between the assets and other liabilities shown.

Since the association had a capital account employed in the conduct of its business, it is immaterial that it had no property specifically designated as "capital" on its books. It is absurd to suppose that Congress intended the taxability of an association to depend upon the manner in which it kept its account books, and upon whether such books showed an item designated "capital" or "capital stock."

The respondent submits finally that this case is not of sufficient public importance or gravity to warrant the granting of a petition of certiorari and that there are no conflicting decisions of lower Federal courts upon the question which this court is here asked to review.

The petition should be denied.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

SEPTEMBER, 1922.

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